



**Excessive & Disproportionate Costs in Litigation
NAH Ltd No. 101/11**

Research Report – February 2011

Prepared by:

**Dr Angus Nurse & Professor John Peysner (Lincoln Law School)
John Flynn (Faculty of Health, Life and Social Sciences)
University of Lincoln
Brayford Pool
Lincoln
LN6 7TS**

For:

The National Accident Helpline Limited

Att. Mr J. White

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1. **INTRODUCTION**

1.1. **Overview**

This research is into the cause of excessive costs in civil litigation. The research was commissioned by the National Accident Helpline Limited (NAH Ltd) following the Ministry of Justice's (MOJ) announcement of a consultation on its proposals for reform of civil litigation costs in England and Wales.¹ The research considers the cause of excessive and disproportionate costs in litigation, in particular in personal injury and clinical negligence claims.

The MOJ's proposals on the costs of litigation seek to implement the recommendations made in Lord Justice Jackson's report on his review of civil litigation costs.² In his report Lord Justice Jackson said that "the new recoverability regime introduced by the Access to Justice Act has had "unfortunate unintended consequences" and that "the conditional fee agreement (CFA) regime has emerged as one of the major drivers of excessive costs"³ due to with recoverable success fees and ATE insurance premiums.

The MOJ in its consultation document explains that:

A range of arguments were put to Sir Rupert during the course of his review both for and against retaining the recoverability of ATE insurance premiums. Those representing claimant interests are generally in favour of recoverability (citing concerns about liability for funding disbursements) and those representing defendant interests are generally opposed to recoverability (citing excessive costs).⁴

Chapter 4, paragraph 3.1 of Lord Justice Jackson's final report sets out sixteen general causes which, in differing combinations and according to particular circumstances, give rise

¹ Ministry of Justice (2010) *Proposals for reform of civil litigation funding and costs in England and Wales*, London: Ministry of Justice – Available at: <http://www.justice.gov.uk/consultations/jackson-review-151110.htm> (accessed 19 January 2011)

² <http://www.judiciary.gov.uk/publications-and-reports/reports/review-of-civil-litigation-costs/civil-litigation-costs-review-reports>

³ Final Report page 48, para 3.26

⁴ Para 81, Ministry of Justice (2010) *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales*, London: Ministry of Justice

to excessive costs in litigation. In considering the causes of excessive costs for the purposes of this research we are particularly concerned with the following causes cited by Jackson (preserving his numbering) :

(iv) Too few solicitors, barristers and judges have a sufficient understanding of the law of costs or how costs may be controlled.

(v) Lawyers are generally paid by reference to time spent, rather than work product

(vii) The preparation of witness statements and expert reports can generate excessive costs.

(xi) There is no effective control over pre-issue costs; certain pre-action protocols lead to magnification of these costs and duplication of effort.

(xii) In some instances there is ineffective case management, both by the parties and by the court.

(xiii) Some cases which ought to settle early settle too late or not at all.

This research is primarily concerned with item (xiii) and the perception by NAH Ltd that defendant behaviour is a significant cause of excessive costs. Lord Justice Jackson recommends that the recoverability of ATE insurance premiums should be abolished and one way costs shifting should be introduced. However if defendant behaviour is a major factor and it is possible to identify the causes of this and take action to reduce their delay, or to modify processes such that any delay and increase in costs caused by their actions can be minimized, this has implications for any recommendations on excessive costs. Insurers may, for example, be failing to investigate cases properly due to inadequacies in the information they collect and unaware of the impact that this has on costs and the timescales involved in determining cases. Alternatively the very nature of processes may be such that there are inbuilt delays in types of cases that require addressing through procedural changes.

This research therefore investigates defendant action on delay and subsequent costs in civil litigation with a focus on personal injury and clinical negligence and conducts an analysis of the level of delay and the impact on costs. It examines the evidence considered by Jackson together with additional data supplied by NAH Ltd to reach conclusions on delay in certain circumstances in civil litigation. The research primarily considers defendant actions and the impact of those actions and we make clear the distinction between defendant action and

defendant behaviour. As data are not currently available on defendant behaviour, the causes of that behaviour or how defendant behaviour is affected by claimant behaviour we cannot at this stage draw any conclusions about behaviour.⁵ However it is possible to draw limited conclusions about defendant action in the context of the processing claims and litigation to resolve claims, especially where liability is denied or there are delays in admitting liability.

This report attempts an analysis of both NAH data and data considered by Lord Justice Jackson; showing how they differ; how their similarities can lead to effective conclusions on delay and where new conclusions emerge on the causes of excessive or disproportionate costs.

1.2. Research Outline

The research was designed to achieve the following outcomes:

- To identify the causes of excessive and disproportionate costs in personal injury and clinical negligence claims;
- To consider the causes of excessive costs set out in Chapter 4, paragraph 3.1 of Lord Justice Jackson's final report of costs in civil litigation and with reference specifically to new data supplied by NAH Ltd to examine whether defendant action is a contributor to costs, and if so, to what extent;
- To analyse the data considered by Lord Justice Jackson (found at Appendices 1-28 of his preliminary report) and where possible, examine whether this data supports his conclusions as to the causes of excessive costs;
- To identify whether defendant delay results in quantifiable increased costs and, where possible, to draw conclusions on whether defendant delay in admitting liability contributes significantly to litigation costs; and
- To identify whether defendant action is a factor which, if altered, has the potential to reduce both sides' costs.

⁵ We consider that this is a separate piece of research work for which additional data are required.

The research tests the hypothesis that defendant action, specifically defendant caused delay, is a significant contributor to excessive costs in litigation. The background to this research is the perception that defendant behaviour is a significant contributor to excessive costs. In its response to Lord Justice Jackson's preliminary report on civil litigation costs NAH Ltd identified defendant insurer behaviour and the nature and complexity of a case as the two most important factors in personal injury cases.⁶ In particular the response indicated that defendant insurers 'dedicate insufficient resource for early investigation' and also that defendant insurance management fails to use effective risk management with the result that 'settlement of cases can be inordinately delayed – even when it is clear that liability rests with the defendant.'⁷ Increased costs are thus incurred when unnecessary work is carried out on a case when defendant insurers fail to admit liability early, but also when claimant solicitors are forced to chase defendants or issue court proceedings. This extra activity adds to costs.

In carrying out this research project we have considered a number of issues relating to the cause of excessive costs in civil litigation. Lord Justice Jackson broadly identifies some possible causes of excessive and disproportionate costs in civil litigation and this research considers costs in the context of the proposed Jackson reforms. However it is beyond the scope of this research to determine the precise underlying causes of defendant delay and the behaviour characteristics (and reasons) involved in delay (i.e. the reasons why cases are not investigated properly by defendant insurers or the other factors within the insurance industry that cause delay.) To conduct such research would require behavioural analysis and the application of interpretive interactionism methodologies⁸ to examine not just the behaviour of defendant insurers within their established processes but also how claimant solicitor behaviour influences that behaviour and how claimant solicitor behaviour is itself a factor in delay which may give rise to additional costs. While the perception of claimant solicitors may be that defendants use 'delay and obfuscation as a tactic to encourage some claimants to give up on a legitimate claim' and also delay admissions of liability 'even in cases where liability is clear'⁹ the data made available for this research, even that data not

⁶ The National Accident Helpline (2009) *National Accident Helpline: Response to the Preliminary Report of the Review of Civil Litigation Costs*, Kettering: National Accident Helpline

⁷ Ibid.

⁸ Denzin, N. (2001), *Interpretive Interactionism (Applied Social Research Methods)*, London: Sage

⁹ The National Accident Helpline (2009) *National Accident Helpline: Response to the Preliminary Report of the Review of Civil Litigation Costs*, Kettering: National Accident Helpline

considered by Jackson and provided by NAH lacks sufficient detail of behavioural factors or actions to allow such conclusions to be reached and supported by the data. As a result, this research confines itself to examination of defendant action, and defendant delay as identified by the NAH data, and the impact of that action but makes recommendations for further research into defendant behaviour.

Given the short period in which this research was conducted¹⁰ there are inevitably limitations on what could be achieved and we make no pretence that the research findings offer a comprehensive analysis of the problem of defendant action. But we consider that the research aims have been broadly met and set out our reasoning below.

¹⁰ Dictated by the period allowed for a response to the MOJ consultation on implementing Jackson and the dates on which data were received.

2. EXECUTIVE SUMMARY

The remit of this research is to examine the real causes of excessive and disproportionate costs in personal injury and clinical negligence claims and, in particular, to review the conclusions on costs contained in Lord Justice Jackson's final report. To achieve this, the research has examined the data considered by Jackson as detailed in the 28 Appendices to his preliminary report, and has sought to identify the causes and costs of delay in data supplied by the NAH Ltd which were not considered by Jackson. The research has also evaluated the extent to which delays in resolving cases and the costs of delay contribute to the overall costs of civil litigation.

Jackson identified sixteen general causes of costs and concluded that some cases which ought to settle early settle too late or not at all. The perception that defendant delay is a cause of late settlement or failure to settle is one issue considered by this research which we consider is also linked to two other causes identified by Jackson; ineffective case management, and lack of effective control over costs and pre-action protocols. We are aware of anecdotal evidence that defendant insurers' delay in responding to certain tasks within the protocol and also that they fail to settle in many cases where early settlement is considered achievable by claimants. While this research was not provided with evidence on which to draw conclusions about defendant behaviour, we have considered the extent and costs of defendant action and its contribution to excessive costs. Having done so, we conclude that defendant action is a significant contributing factor in some 24% of cases considered by this research where that delay has been specifically recorded (i.e. the Jonah dataset) and that defendant delay (whatever its causes) can contribute significantly to costs in certain types of case.

The evidence of the various datasets provided by the NAH indicates that there is a significant number of cases where settlement could have been achieved earlier and at a lower level of costs than was eventually incurred. It is regrettably difficult to provide a precise figure for the number and type of cases where defendant delay is the primary factor because a range of factors can influence the delay of a case and the data available to us only records defendant delay and not the other causes of delay. Thus we are unable to clearly assess the levels of, or quantify, court delay or claimant delay and their contribution to cases although we would recommend further research into these factors. The nature of the contact with the defendant may also be a factor and the research lacked available data

on the tasks within the protocol or other points within the process at which defendant delay occurred. Thus our conclusions are confined to an assessment of the impact of defendant *action* rather than behaviour.

Having reviewed the data we consider that Jackson's conclusions on the sixteen causes of excessive cost are broadly accurate albeit not clearly supported by the data that he presents in the Appendices to his preliminary report. Jackson identifies that there is incentive on a lawyer under the current hourly paid cost system to increase litigation effort in order to increase recoverable cost. However, in identifying that some cases that ought to settle early do not do so, he does not directly address the importance of defendant delay as a factor. This may be either because defendants do not marshal sufficient resources to come quickly to a view and then to terms of settlement or that initial offers made by defendants are routinely much lower than the 'going rate' thus producing delay before settlement happens, often at a higher rate. This research has, however, identified that the cost of defendant delay is significantly higher than other delay in those cases where delay can be quantified. Across the 19,988 cases contained within a Jonah dataset our analysis indicates that defendant delay has an average cost of £57.83 per day compared to an average cost of £8.49 per day for other (unspecified) causes of delay.

We thus conclude that defendant delay has an average cost six times higher than the average cost of other causes of delay with the potential to significantly increase costs the longer the delay continues. If this were to be replicated across a larger number of cases it would indicate a significant level of excessive and disproportionate costs. However, while we are unable to clearly identify the number of delay days across all datasets we are, when looking at those cases where defendants fail to admit liability early, able to estimate the contribution of defendant delay to the conduct and duration of cases in certain datasets. The data that we have examined shows that in cases where there is defendant delay such that settlement cannot be achieved and court action is taken to resolve a case, claimant solicitors win at court in 90% or higher of these cases indicating that defendant delay is a factor in increased court fees and the time taken to resolve cases.

The evidence that we have reviewed as part of this research also indicates that in cases where there has been delay, the average costs exceed the average damages, such that at some levels average costs are more than double average damages.¹¹ Cases thus may become uneconomical to pursue at certain value levels and case types and the anecdotal

¹¹ See, for example Appendix 24 of Lord Justice Jackson's Final Report

evidence suggests that this may be a tactical decision on the part of defendant insurers who seek to delay cases beyond the point where they are considered worthwhile pursuing. As a result, claimants may be at the disadvantage of pursuing a case where both costs and the time involved are disproportionate. We discuss the duration of cases within this research and propose further research into defendant behaviour with a view to identifying factors that determine defendant delay and mechanisms for resolving defendant delay.

3. RESEARCH METHODOLOGY

This research was completed primarily by analysis of data in MS Excel 2007 together with examination and analysis of the policy conclusions drawn by Jackson in his preliminary report and final report.

3.1. Jackson Data

In his review of civil litigation Lord Justice Jackson considered a range of data on costs including court data, summary data from the Compensation Recovery Unit, several individual datasets on cases handled by liability insurers and a report on personal injury costs prepared by Frontier Economics and the Association of British Insurers (ABI). As part of this research we have reviewed Jackson's data to see what it reveals about costs and have also reviewed his findings on costs.

We discuss our analysis and conclusions in Section 3 but note here that while Jackson's data contains much useful information about the amount of costs and level of costs in certain case types, it reveals little about the causes of excessive costs.

3.2. NAH Ltd data

NAH Ltd provided data for analysis which included:

- Allianz data - on 129,433 ATE Premiums with additional data on the operation of the ATE premium and the duration/completion of the case. This included data where liability was admitted and provided for an analysis of the type of case and duration of cases;
- Benchmarking Data – *Jonah* data on 4376 cases that had been to court and closed and the number of these cases that had been won together with approximately 20,000 cases where defendant delay had been recorded as part of the recording of protocol tasks –

this allowed for analysis of the average percentage of cases that are won (within the dataset) and which, by inference could have been settled earlier as well as an assessment of the extent of defendant delay and its overall contribution to costs. From this data we also sought to quantify the cost of defendant delay; and

- Firms Data – a smaller dataset containing data from firms covering a month's worth of referrals sent out by NAH Ltd in November 2006. We understand that the complete dataset consists of some 336 successful cases but at time of writing we appear to have received only detailed data on 87 of these cases and there are some data issues as outlined at Appendix 2. We have however considered the summary of this data.

In addition to this information we also examined NAH Ltd's submission to the Jackson report and anecdotal evidence on the causes of delay in order to determine if the data supplied provided evidence to support the perceptions of defendant delay.

4. THE JACKSON REVIEW

Lord Woolf regarded delay as one of the fundamental problems of civil litigation and introduced two methods: the rationed procedural track (the Fast Track) and the managed procedure (The Multi-Track) which so far as *litigation* is concerned appear to have solved the problem with time from issue to trial dropping dramatically following the introduction of the Civil Procedure Rules (CPR). His thesis was that case management in its prescriptive or individual approach would reduce delay, reduce litigation effort and, therefore, reduce cost.

4.1. Jackson's Data

It should be noted that in his compendious review of the sixteen general causes of excessive costs Jackson does not specifically point to delay.¹² Our analysis of the data contained within the 28 Appendices to the Jackson report concludes that the question of delay was not explicitly considered by Jackson in his review although some conclusions on the cause of costs are clearly based in part on the data collected and in part on a policy analysis.

In our analysis we find certain Appendices useful in identifying the cause of excessive costs and others as unhelpful as follows:

¹² Final Report paragraph 3.1 page 42

Useful/Unhelpful	Appendix Numbers
Useful	1,1b,2,7,8,9,23,24,26,27,28
Unhelpful	3,4,5,6,10,11,12,13,14,15,16,17,18,19,20,21,22,25,29

Appendix 1 and 2, for example, identify categorical factors in the duration and costs of a case. The basic relationship demonstrated by the Jackson data is that the speed of a case has a significant impact on the costs. Appendix 1 identifies as categorical factors:

- Track (Fast/not allocated)
- Type of Case (Contract/Personal Injury)

Appendix 2 identifies as categorical factors:

- Track (MT/FT) for RTA¹³ (Jackson classes RTA as Personal Injury (PI))
- Type of Case (but has many more than 2 categories in this appendix)

Perhaps most useful of the Jackson data is Appendix 24 whose table demonstrates that settlement costs effectively double when cases go to Post litigation for amounts up to £50,000. However average damages up to £50,000 are the same whether settled at Pre or Post litigation.¹⁴ Jackson's data here indicates that the problem of excessive costs is most prevalent at the lower end of the scale as follows:

- in respect of cases with a value up to £5,000 the average damages (pre litigation) were £2,541.66 while the average costs were £4,262.17. For post litigation settlements the average damages were £2,748.32 while the average costs were £8,046.84.

¹³ We note here that Jackson classes RTA as Personal Injury (PI) and the categories used by Jackson are not directly comparable to the more helpful and comprehensive classifications contained in the NAH data.

¹⁴ Note that no data are available in respect of Pre litigation for amounts from £50,000 upwards.

- in respect of cases with a value between £5,000 and £15,000 the average damages (pre litigation) were £8,215.78 while the average costs were £6,323.96. For post litigation settlements the average damages were £8,728.24 while the average costs were £11,637.24.

Jackson's data thus provides for a definition of 'excessive' costs where the costs involved in pursuing a damages award greatly exceed the amount of that award and are considered to be too high.¹⁵ But while Jackson acknowledges that some cases which ought to settle early settle too late or not at all, the data on which his conclusions are based does not provide direct evidence of the causes of delay, or even that delay leads to identifiable costs increases in all types of case or over specific durations. Jackson does, however, explain that cases that fail to achieve an early settlement and which go to trial incur higher costs which Appendices 24 and 28 shows can greatly exceed the damages involved. Appendix 28 indicates that the claimed costs can exceed the paid costs by approximately 30% and that average legal costs are higher than damages in employment, personal injury and motor claims.

Appendix 23 shows that the longer the time spent on trying to resolve the issue of costs, generally the lower the percentage saved in costs (Fig. 1).

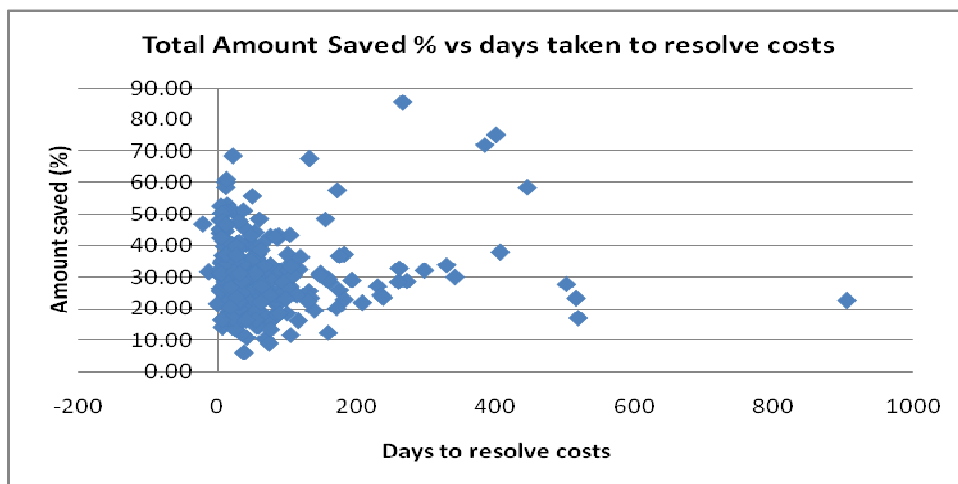


Fig. 1 Total Amount saved (%) vs. time taken to resolve costs (Jackson App. 23)

While, predictably, time is a factor in the amount of costs involved and the generation of excessive or 'disproportionate costs; Jackson's data does not directly address the points at

which excessive costs are generated. He acknowledges that ‘those litigants who wish the court to resolve their disputes are fully entitled to press on to trial’¹⁶ but does not directly address the use of court action as a means to deal with delay in settlement. We address this later in this research as the data provided by NAH suggests that in the majority of cases where claimants take legal action they are successful.¹⁷ Thus if claimants are taking court action as a direct response to defendant delay (whether through inaction or as a deliberate tactic) a higher level of costs than is ‘necessary’ is being incurred,

However, the Association of British Insurers (ABI) PIL has claimed that significant savings are being made in EL and PI success fees and that this is in part because success fees are ‘usually proportional’ to base costs, hence a reduction in base costs (basic legal fees) leads to a reduction in success fees.¹⁸ Thus if base costs are incurred because of the lack of incentive to control costs then there is potential for ‘excessive’ costs to be routinely incurred where delay or at least lack of timely action results in increased activity which pushes fees up.

The Appendix 23 data¹⁹ shows high average levels of costs as percentage of damages. In 2007 the figure was 227% for files with a value of £0 - £15,000 while in 2008 it was 218%.²⁰

4.2. Jackson’s Conclusions on Costs

Lord Justice Jackson has found that excess cost remains a problem. In personal injury cases, particularly lower value cases, it is only *claimant* costs that are relevant because they are and will remain recoverable from a party not in a contractual relationship with the claiming lawyer. *Defendant* costs do not attract the same attention because they are not recoverable from another party except in rare cases and even then ATE gives cost protection. Further, they are subject to stiff competitive market pressures in the context of

¹⁵ Final Report paragraph 1.2 page 40

¹⁶ Final Report paragraph 3.32, page 49

¹⁷ We do, however, note that this conclusion may not necessarily be replicated across all datasets and base this conclusion solely on the data provided to us for this research.

¹⁸ Jackson Preliminary Report, Appendix 28

¹⁹ Appendix 23 - Two years of data from a liability insurer

²⁰ We note however that the sample size was higher in 2008 (247) than in 2007 (182).

the contract between repeat players (insurers and self insured parties) and lawyers.²¹ The Jackson solution for lower value litigation is to introduce fixed costs generally and qualified one way cost shifting in personal injury cases. In other words, in low value personal injury cases where the claimant wins then his costs are recoverable on a fixed cost basis and the cost protection offered by this system removes the need for ATE protection and, it follows, the need for it to be recoverable.

The rationale for this approach which must necessarily also take into account another Woolf principle of 'equality of arms' is that fixed costs represent a fair reward for the claimant lawyer and are neither too low to force the lawyer to skimp work and, perhaps, increase the danger of under-settlement, nor too high, thus creating over-reward. If this approach is adopted by the Ministry of Justice, particularly in the context of personal injury cases, it is clear that the question of delay re-enters the discussion for two reasons,

Firstly, if the view is taken that the historic recoverable costs, on which fixed costs are likely to be based, represent arguably excessive claimant hourly paid costs and that fixed costs will drive that excess out of the system it is necessary to be certain what the cause of the excess is. It may, of course, be because of the incentive on a lawyer under the current hourly paid cost system to increase litigation effort in order to increase recoverable cost. (This is certainly Jackson's view – see Jackson Final Report paragraph 3.2.3, page 47) It may, for example, be caused by delay brought about by inefficiencies produced by the court system, or procedural rules. It may be caused by defendant delay either because defendants do not marshal sufficient resources to come quickly to a view and then to terms of settlement or that initial offers made by defendants are routinely much lower than the 'going rate' thus producing delay before settlement happens, often at a higher rate. In order to ascertain an appropriate rate for fixed costs these various causes of delay must be clearly identified and costed and either eliminated or if this is not possible allowed for in a fair rate.

Secondly, if delay (particularly defendant delay in the pre-issue, pre litigation phase), outside judicial case management remains in the system post fixed costs (when claimant lawyers no longer have an economic incentive to delay) then the danger of under-settlement may be present if this delay exhausts the claimant lawyer's ability to continue with the case and may force claimant lawyers either to skimp the work or encourage under-settlement.

²¹ Of course in some cases, often behind the veil, one defendant will recover costs from a co-defendant or contributor but the quantum of these costs rarely is the subject of public dispute.

It follows that in low value claims, particularly lower value personal injury cases, it is necessary to examine all causes of delay and come to a conclusion as to whether the introduction of fixed recoverable costs, at any particular rate, will drive in efficiencies on both sides or leave claimant's vulnerable and justice not served. This report addresses one key issue in pre-issue personal injury cases – defendants' delays which, if found, are likely to be highly relevant in the period prior to the involvement of the court.

5. DELAY AND EXCESSIVE OR DISPROPORTIONATE COSTS

As outlined above, Jackson indicates that the duration and complexity of cases has an impact on excessive and disproportionate costs. He indicates that hourly paid lawyers lack incentive to deal with cases quickly and that this and procedural inefficiency impacts negatively on speedy resolution of cases. Jackson is, however, silent on specific reasons for delay in cases that should be settled early, while the NAH Ltd and others have commented that defendant delay is a significant factor in excessive costs.

Thompson's Solicitors (2009) suggest that delay is endemic in the insurance industry and can be a tactical practice, stating that:

A whole industry is built around complex claims strategies designed to best advance their interests. For some insurers this can mean trying to act fairly and reasonably – turning the cases over rather than instinctively trying to block them or reduce them in value. Sadly in Thomsons' experience for too many it means strategies including claims capture (designed to deprive victims of legal advice), the use of aggressive negotiation tactics through loss adjusters or otherwise, attrition based strategies such as delays and failure to reply to correspondence.²²

Thompsons also suggest that:

The net result is that whereas in a typical small claim it is unusual for the parties to instruct lawyers, insurers in PI claims frequently dig in and contest the case as a matter of course, whatever their value and with disproportionate resources. They fight technical points and instruct both solicitors and counsel.

The calculation may be that whilst it is disproportionate to incur such costs in some cases, the insurers benefit from the many other cases where the Claimant faced with this show of force gives up or undersettles to conclude the matter quickly.²³

The data supplied by NAH Ltd for this research allows for evaluation of the extent of delay (as defined by the data) across a range of cases and some indication of the cost of defendant delay as a proportion of the total delay cost and as a factor in specific types of case. However there are some limitations in the data which impact on the feasibility of assessing the significance of defendant delay as an overall contributor to excessive costs.²⁴ However, we have considered defendant delay in respect of its impact on the duration of cases, the action required to be taken in cases and the cost of cases.

5.1. Duration

The duration of a claim can be a significant factor in the overall cost as process or settlement failures can mean that cases simply take too long to resolve and incur additional and disproportionate costs.

We examined 129,433 records, 43,608 of which (33.69%) contained a confirmed date on which liability was admitted. Three Duration fields were created :

WONPAID DATE – DATE OF COVER (WPD- COVER)	(a)
NCSH LIABILITY DATE – DATE OF COVER (LAD – COVER)	(b)
WONPAID DATE – NCSH LIABILITY DATE (WPD-LAD)	(c)

A ratio of (b)/(a) converts (b) into the percentage of time spent on (a)'s duration. Mean durations (days) for a, b and c, with the percentage of time spent until Liability admitted are shown below (Table 1) :

²² Thompsons Solicitors (2009) Civil Litigation Costs Review: Thompsons Solicitors response to the Interim Report

²³ Ibid.

²⁴ See Appendix 2 for detail on the limitations of the available data.

Mean durations (n=43,608)	Average of WPD-COVER	Average of WPD-LAD	Average of LAD-COVER	Average of (LAD-Cover)/ (WPD-Cover)
Ncsh Liability Admitted (blank records)	547 647	331	216	37.1%
Grand Total	613	331	216	37.1%

Table 1 : Mean duration (Wonpaid date – Date of Cover, Wonpaid date – Liability Admitted date, Liability Admitted date - Cover date) and Percentage of time spent on LAD-Cover relative to WPD-Cover.

The following Table 2 shows the analysis for those records which have an incident date and a Closed policy date, but they are categorised by the years that the policy started.

Year started	Count of Policy No.	Mean Average duration	Max of duration	St. Deviation of duration	Records Missing a CLOSED date
2005	19977	835	6021	458	133
2006	20842	774	4987	414	742
2007	22487	699	5782	374	2237
2008	25208	582	5518	325	7055
2009	19497	467	6029	293	15394
2010	5417	320	1929	273	32945
Grand Total	113428	653	6029	399	58506

Table 2 : For years the policy started, durations of Incident date to Closed date (days).

The mean averages (overall mean = 653 days) and the maximum durations (overall mean 6029) are reasonably similar across the years. The mean duration decreased steadily year-on-year from 835 days in 2005 (n=19,977) to 320 days in 2010 (n=5417), a decrease overall of 78.1%. However, the Incident dates can be as old as the 1950s, which increases these summary durations.²⁵

5.2. Defendant Contributions to Delay

The evidence that we have reviewed indicates that defendant action is a contributor to delay in certain circumstances. The NAH Ltd Jonah data (19,988 cases) shows that 88% of these cases are not completed to the due date. In the 19,988 cases, 12,897 of which have actually

²⁵ It should also be noted that some 58,000 records did not contain one of the two required dates.

finished, the data provides an indicator of the average Total delay and the average total defendant delay (Table 3).

	Count of Case Id	Average of Total Delay Days	Average of Defendant Delay Days	Average of Value (£)
Finish Ontime or early	2396	-84	29	2293 (11.99%)
Finish Late	17592	375	49	2776 (88.01%)
Grand Total	19988	320	47	2718 (100.00%)

Table 3 : Defendant Delay days and Total Delay dates categorised by whether late or finishing on time or early, with mean value (£)

Our analysis suggests that 24% of cases are delayed due to defendant action but also that the extent of defendant delay varies. Thus, it is not possible to suggest that defendant delay is a significant factor in all cases, especially in the absence of data concerning the other causes of delay.

Row Labels	Values Average of Total Delay Days	Average of Defendant Delay Days	Average of Value (£)	Count of Case Id
Null records	338	70	2485	7091 (35.48%)
Finished	310	34	2846	12897 (64.52%)
Grand Total	320	47	2718	19988

Table 4 : Mean of Total Delay days and Defendant Delay days and their relationship to their corresponding mean value (£)

In cases where defendant delay is such that court action is taken to try and resolve the issue and/or force a settlement the claimant wins in better than 85% of cases across the Jonah dataset. Examination of a total of 4376 cases from 20 firms showed that in 3864 cases the firms won when taking the case to court, a success rate of 90%.

5.3 The Cost of Delay

The cost of delay across the datasets provided by NAH has also been considered both in terms of the impact that early admission of liability has on ATE premiums (£) and increases in the time taken to pursue a case (table 5).

	Liability Discount		Grand Total
Track Description	No	Yes	
Group Actions - Non Liability Admitted			
Count of Policy No.	5		5
Average of Premium (£)	227395		227395
Non-RTA Fast Track			
Count of Policy No.	85606	22923	108529
Average of Premium (£)	1213	575	1078
Non-RTA Multi Track			
Count of Policy No.	1621	3	1624
Average of Premium (£)	2484	604	2481
RTA Fast Track			
Count of Policy No.	25792	35080	60872
Average of Premium (£)	419	324	364
RTA Multi Track			
Count of Policy No.	881	32	913
Average of Premium (£)	2293	336	2224
Total Count of Policy No.	113905	58038	171943
Total Average of Premium (£)	1070	423	852

Table 5 : Mean premium for all Track Descriptions and whether Liability Discounted (Yes/No).

Table 5 shows that the 58,038 policies with Liability Discount have mean values much lower than if there is no Liability Discount. For example, with non-RTA Fast Track (n = 108,529 policies), the mean premium with Liability Discount is £575 but the mean without Liability Discount is £1213, about twice as expensive.

With RTA Multi-track, the increase is about 6 times as great (£2293 against £336), though based on only 913 policies in total. Further analysis of this data allows for identification of the average value of defendant delay per day (Table 6) as follows:

Row Labels	Values		Average of Value(£)	Count of Case Id
	Value (£) per single Total Delay Day	Value (£) per single Defendant Delay Day		
Null records	7.35	35.50	2485	7091 (35.48%)
Finished	9.18	83.71	2846	12897 (64.52%)
Grand Total	8.49	57.83	2718	19988

Table 6 : Indicator variable for End date (End date has a Null value or is finished)

We note (Table 6), therefore, that the average value of defendant delay is £57.83 per day, significantly higher than the general cost of delay £8.49. However, the data provided does not record the other costs of delay and this is an area on which further research is needed. If, for example, claimant solicitor actions are a factor (which can be inferred from the data if all delay is not due to the defendant) then this is also a cost of delay albeit one that generates lower costs than defendant delay.

6. CONCLUSIONS

The evidence that we have analysed as part of this research indicates that defendant delay is a significant factor in excessive costs, at least in some cases. Jackson identified the failure to settle cases early as one factor in excessive and disproportionate costs and also identified failures in case management and the lack of incentive for speedy action as factors that could result in excessive and disproportionate costs. We broadly endorse these conclusions but consider that there is a link between delay and excessive costs that needs to be explicitly considered in any changes to the costs regime given Jackson's conclusions that the time taken to resolve cases has an impact on excessive and disproportionate costs, and our own analysis of delay as recorded by the NAH Ltd data.

Jackson concluded, for example, that for every £1.00 for which the liability insurers paid out in damages, they paid out £1.80 in claimant costs. We have verified this figure in Jackson's data but our analysis of the NAH Ltd data supplied as part of this research indicates that the amount of costs incurred is not only linked to the overall time taken to pursue a case to conclusion but also to the amount of defendant delay involved. Based on the evidence of one dataset where the extent of defendant delay is recorded our analysis indicates that defendant delay has an average daily cost of £57.83 compared to an average daily cost of £8.49 for other (unspecified) causes of delay. While we would urge caution in quoting these figures as an average across the industry, unless it is possible to replicate this across a

larger dataset²⁶, this at least provides an indication of the average higher costs of defendant delay.

We also conclude that defendant delay is a factor in adding unnecessary court costs to cases where there is a failure to reach a settlement and court action is taken as a means of resolving the case or forcing a settlement. Unfortunately because the point at which delay takes place and court action is subsequently taken is not recorded in the data, we are unable to quantify this. But we note that claimants succeed in 90% of the cases that proceed to court and this indicates unnecessary fees and time spent on progressing a case which can arguably be attributed to defendant failure to settle.

We therefore recommend further research into the causes of delay and defendant behaviour specifically to determine whether endemic practices within the insurance industry cause delay or whether insurers' responses are determined by claimant behaviour, and to determine the key points at which delay occurs within the protocol. If successful such research could identify whether changes to the handling of cases will reduce excessive and disproportionate costs. Our outline proposal for this research is contained at Appendix 3.

7. QUERIES

Any queries concerning this draft report or any aspect of this research should be directed to:

Angus Nurse
Research Fellow
Lincoln Law School
University of Lincoln
Brayford Pool
Lincoln, LN6 7TS

Email: anurse@lincoln.ac.uk

²⁶ To provide a meaningful analysis we agree with the APIL's suggestion of 10% of all claims – see Jackson Appendix 28.

Appendix 1 – Summary of Data Analysis

Our analysis of the different datasets sought to determine the average durations of cases, the extent to which defendant delay impacted on these durations and, where possible, the cost of defendant delay in relation to ‘other’ delay such that we would be able to determine if defendant delay were a significant factor in the overall duration and cost of a case.²⁷ For example, Defendant Contribution-2 dataset (Jonah data) as below to show the impact of the 2 protocols.

Defendant Contribution 2 dataset has 106,423 Case IDs with these fields

Firm	Case Id	Acknowledgment Days	Detailed Liability Days	Value
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Out of which we generated 2 Indicator variables.....

Firm	Case Id	Acknow Days	Acknow (-1, 1,2)	Detailed Liability Days	DetLibDay (-1,1,2)	Value (£)
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There are some measures of success quantified or noted in this dataset i.e. those achieving the protocols of 21 days or 90 days and the associated mean values (£). Table 1 (below) shows the quantities.

		Detailed Liability days			
		Null records	90 days or less (inside the protocol)	(91 days or more)	Grand Total
Acknowledgment days					
Null records					
Count of Case Id		69749	63	6	69818
Average of Detailed Liability Days		#DIV/0!	1	217	19
Average of Acknow Days		#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!
Average of Value (£)		568	1656	2084	569
0-21 days (inside the protocol)					
Count of Case Id		3119	28171	1942	33232
Average of Detailed Liability Days		#DIV/0!	2	221	16
Average of Acknow Days		2	0	2	0
Average of Value (£)		1681	2734	2307	2611
22 days or more (outside the protocol)					
Count of Case Id		1067	876	1430	3373
Average of Detailed Liability Days		#DIV/0!	51	186	135

²⁷ Defendant delay was pre-recorded in certain of the datasets provided to us and we have used this field in our analysis

Average of Acknow Days	72	57	124	90
Average of Value (£)	2016	1907	2059	2006
Total Count of Case Id	73935	29110	3378	106423
Total Average of Detailed Liability Days	#DIV/0!	3	206	25
Total Average of Acknow Days	20	2	54	9
Total Average of Value (£)	636	2707	2202	1254

We also examined data on the type of case to see if it was possible to draw conclusions on delay and costs in specific types of cases.

Case Type (n=30 categories including the blanks) summary, sorted by size

Count of Policy No		
Case Type Description	Total	%
ACCIDENT AT WORK	47005	27.3
SLIP OR TRIP	27606	16.1
RTA – DRIVER	26596	15.5
RTA – PASSENGER	25986	15.1
OCCUPIER LIABILITY	23761	13.8
RTA - PEDESTRIAN/CYCLIST	9055	5.3
OTHER	6453	3.8
PUBLIC LIABILITY	2205	1.3
PRODUCT LIABILITY	1267	0.7
IND. DISEASE – DEAFNESS	544	0.3
IND. DISEASE- RSI	320	0.2
PACKAGE TRAVEL LITIGATION	313	0.2
IND. DISEASE – MESOTHELIOMA	185	0.1
IND. DISEASE - OTHER ASBESTOS	174	0.1
IND. DISEASE – OTHER	153	0.1
IND. DISEASE – VWF	73	0.0
(blank)	67	0.0
RTA - PRE FEB '04	42	0.0
IND. DISEASE – DERMATITIS	34	0.0
IND DISEASE - PLEURAL THICKENING	33	0.0
IND. DISEASE - CHEST DISORDERS	23	0.0
ASTHMA	19	0.0
IND. DISEASE - PLEURAL PLAQUES	6	0.0
IND. DISEASE – ASBESTOSIS	6	0.0
IND. DISEASE – LEGIONNAIRE	5	0.0
GROUP ACTIONS	4	0.0
IND DISEASE – CANCER	3	0.0
IND. DISEASE – BURSITIS	2	0.0
BULLYING	2	0.0
IND. DISEASE - CARPAL TUNNEL	1	0.0

Grand Total	171943	100.0
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The 5 largest Case Types account for 87.8% of the volume of claims. Table 6 shows that RTA –Driver and RTA-Passenger have low mean premium values of £396 and £364 respectively. Typically, these 2 categories have mean premium levels about 2.5 to 3 times lower than the other 3 major categories (Accident at work, Slip or trip and Occupier Liability).

Row Labels	Values Count of Policy No.	Average of Premium (£)
ACCIDENT AT WORK	47005	1046
SLIP OR TRIP	27606	1118
RTA – DRIVER	26596	396
RTA – PASSENGER	25986	364
OCCUPIER LIABILITY	23761	1106
RTA - PEDESTRIAN/CYCLIST	9055	458
OTHER	6453	1042
PUBLIC LIABILITY	2205	1341
PRODUCT LIABILITY	1267	1137
IND. DISEASE - DEAFNESS	544	1792
IND. DISEASE- RSI	320	2287
PACKAGE TRAVEL LITIGATION	313	4323
IND. DISEASE - MESOTHELIOMA	185	2024
IND. DISEASE - OTHER ASBESTOS	174	1883
IND. DISEASE – OTHER	153	2030
IND. DISEASE – VWF	73	2332
(blank)	67	1274
RTA - PRE FEB '04	42	367
IND. DISEASE - DERMATITIS	34	1807
IND DISEASE - PLEURAL THICKENING	33	2591
IND. DISEASE - CHEST DISORDERS	23	2362
ASTHMA	19	2171
IND. DISEASE - PLEURAL PLAQUES	6	2400
IND. DISEASE - ASBESTOSIS	6	2567
IND. DISEASE - LEGIONNAIRE	5	1359
GROUP ACTIONS	4	52325
IND DISEASE – CANCER	3	2583
IND. DISEASE - BURSITIS	2	3750
BULLYING	2	2050
IND. DISEASE - CARPAL TUNNEL	1	2000
Grand Total	171943	852

Table : Mean premium (£) by Type of case (sorted by number of policies from largest to smallest)

Case Type x Track Description cross tab

Count of Policy No	Track Description Group Actions -					
Case Type Description	Non Liability Admitted	Non-RTA Fast Track	Non-RTA Multi Track	RTA Fast Track	RTA Multi Track	Grand Total
ACCIDENT AT WORK		46276	696	33		47005
ASTHMA		13	6			19
BULLYING			2			2
GROUP ACTIONS	4					4
IND DISEASE – CANCER			3			3
IND DISEASE - PLEURAL THICKENING		2	31			33
IND. DISEASE – ASBESTOSIS		1	5			6
IND. DISEASE – BURSITIS		1	1			2
IND. DISEASE - CARPAL TUNNEL		1				1
IND. DISEASE - CHEST DISORDERS		11	12			23
IND. DISEASE – DEAFNESS		518	26			544
IND. DISEASE – DERMATITIS		28	6			34
IND. DISEASE – LEGIONNAIRE		4	1			5
IND. DISEASE – MESOTHELIOMA		4	181			185
IND. DISEASE - OTHER		75	78			153
IND. DISEASE - OTHER ASBESTOS		18	156			174
IND. DISEASE - PLEURAL PLAQUES			6			6
IND. DISEASE – VWF		57	16			73
IND. DISEASE- RSI		257	63			320
OCCUPIER LIABILITY		23574	166	21		23761
OTHER		6357	60	36		6453
PACKAGE TRAVEL LITIGATION	1	311	1			313
PRODUCT LIABILITY		1247	17	3		1267
PUBLIC LIABILITY		2192	13			2205
RTA – DRIVER		8		26309	279	26596
RTA – PASSENGER		9	3	25677	297	25986
RTA - PEDESTRIAN/CYCLIST		6		8728	321	9055
RTA - PRE FEB '04				37	5	42
SLIP OR TRIP		27535	64	6	1	27606
(blank)		24	11	22	10	67
Grand Total	5	108529	1624	60872	913	171943

Table above explodes into Table below to include mean Premium

Average of Premium (£)	Track Description					
	Group Actions - Non Liability Admitted	Non-RTA Fast Track	Non- RTA Multi Track	RTA Fast Track	RTA Multi Track	Grand Total
Case Type						
ACCIDENT AT WORK		1020	2748	385		1046
ASTHMA		1888	2783			2171
BULLYING			2050			2050
GROUP ACTIONS	52325					52325
IND DISEASE - CANCER			2583			2583
IND DISEASE - PLEURAL THICKENING		2388	2604			2591
IND. DISEASE - ASBESTOSIS		3000	2480			2567
IND. DISEASE - BURSITIS		3000	4500			3750
IND. DISEASE - CARPAL TUNNEL		2000				2000
IND. DISEASE - CHEST DISORDERS		2630	2117			2362
IND. DISEASE - DEAFNESS		1764	2356			1792
IND. DISEASE - DERMATITIS		1658	2504			1807
IND. DISEASE - LEGIONNAIRE		1299	1600			1359
IND. DISEASE - MESOTHELIOMA		1813	2029			2024
IND. DISEASE - OTHER		1942	2116			2030
IND. DISEASE - OTHER ASBESTOS		2177	1849			1883
IND. DISEASE - PLEURAL PLAQUES			2400			2400
IND. DISEASE - VWF		2315	2396			2332
IND. DISEASE- RSI		2136	2903			2287
OCCUPIER LIABILITY		1094	2845	377		1106
OTHER		1034	2292	370		1042
PACKAGE TRAVEL LITIGATION	927675	1350	2700			4323
PRODUCT LIABILITY		1127	2005	543		1137
PUBLIC LIABILITY		1333	2683			1341
RTA - DRIVER		864		375	2376	396
RTA - PASSENGER		604	0	345	2082	364
RTA - PEDESTRIAN/CYCLIST		1011		392	2241	458
RTA - PRE FEB '04				367	370	367
SLIP OR TRIP		1117	1923	383	1650	1118
(blank)		1028	2361	379	2639	1274
Grand Total	227395	1078	2481	364	2224	852

Table : Mean premium (£) for Case Type by Track Description

Case Type x Liability discount cross tab

Count of Policy No		Liability Discount	
Case Type Description	No	Yes	Grand Total
ACCIDENT AT WORK	34465	12540	47005
SLIP OR TRIP	23354	4252	27606
RTA – DRIVER	16997	9599	26596
RTA - PASSENGER	2335	23651	25986
OCCUPIER LIABILITY	19025	4736	23761
RTA - PEDESTRIAN/CYCLIST	7254	1801	9055
OTHER	5369	1084	6453
PUBLIC LIABILITY	2096	109	2205
PRODUCT LIABILITY	1049	218	1267
IND. DISEASE - DEAFNESS	544		544
IND. DISEASE- RSI	320		320
PACKAGE TRAVEL LITIGATION	294	19	313
IND. DISEASE - MESOTHELIOMA	185		185
IND. DISEASE - OTHER ASBESTOS	174		174
IND. DISEASE - OTHER	152	1	153
IND. DISEASE - VWF	73		73
(blank)	58	9	67
RTA - PRE FEB '04	25	17	42
IND. DISEASE - DERMATITIS	32	2	34
IND DISEASE - PLEURAL THICKENING	33		33
IND. DISEASE - CHEST DISORDERS	23		23
ASTHMA	19		19
IND. DISEASE - PLEURAL PLAQUES	6		6
IND. DISEASE - ASBESTOSIS	6		6
IND. DISEASE - LEGIONNAIRE	5		5
GROUP ACTIONS	4		4
IND DISEASE - CANCER	3		3
IND. DISEASE - BURSITIS	2		2
BULLYING	2		2
IND. DISEASE - CARPAL TUNNEL	1		1
Grand Total	113905	58038	171943

Table above explodes into Table below to include mean Premium

Case Type	Liability Discount (N, Y)				Total Average of Premium (£)	Total Count of Policy No.
	N Average of Premium (£)	Count of Policy No.	Y Average of Premium (£)	Count of Policy No.		
ACCIDENT AT WORK	1216	34465	577	12540	1046	47005
ASTHMA	2171	19			2171	19
BULLYING	2050	2			2050	2
GROUP ACTIONS	52325	4			52325	4
IND. DISEASE - CANCER	2583	3			2583	3
IND. DISEASE - PLEURAL THICKENING	2591	33			2591	33
IND. DISEASE - ASBESTOSIS	2567	6			2567	6
IND. DISEASE - BURSITIS	3750	2			3750	2
IND. DISEASE - CARPAL TUNNEL	2000	1			2000	1
IND. DISEASE - CHEST DISORDERS	2362	23			2362	23
IND. DISEASE - DEAFNESS	1792	544			1792	544
IND. DISEASE - DERMATITIS	1881	32	625	2	1807	34
IND. DISEASE - LEGIONNAIRE	1359	5			1359	5
IND. DISEASE - MESOTHELIOMA	2024	185			2024	185
IND. DISEASE - OTHER	2040	152	625	1	2030	153
IND. DISEASE - OTHER ASBESTOS	1883	174			1883	174
IND. DISEASE - PLEURAL PLAQUES	2400	6			2400	6
IND. DISEASE - VWF	2332	73			2332	73
IND. DISEASE- RSI	2287	320			2287	320
OCCUPIER LIABILITY	1239	19025	570	4736	1106	23761
OTHER	1135	5369	583	1084	1042	6453
PACKAGE TRAVEL LITIGATION	4571	294	499	19	4323	313
PRODUCT LIABILITY	1255	1049	569	218	1137	1267
PUBLIC LIABILITY	1385	2096	500	109	1341	2205
RTA – DRIVER	442	16997	314	9599	396	26596
RTA - PASSENGER	724	2335	329	23651	364	25986
RTA - PEDESTRIAN/CYCLIST	493	7254	318	1801	458	9055
RTA - PRE FEB '04	389	25	336	17	367	42
SLIP OR TRIP	1218	23354	572	4252	1118	27606
(blank)	1417	58	354	9	1274	67
Grand Total	1070	113905	423	58038	852	171943

Table : Mean premium (£) for Case Type by Liability Discount

Appendix 2 – Data limitations and Analysis issues

In considering the Allianz, Benchmarking (by CD), and Jonah (3 Defendant Contributions) datasets which seem to originate from 3 mutually exclusive databases, quite critically we were not able to integrate 2 or more datasets by Policy Number or Case ID in Excel 2007. Further, the late provision of the Solicitor Reference did not help us to proceed into a more complete analysis.

To progress any further with this work we would require datasets where the key field e.g. policy ID/case ID/Solicitor reference ID, will contain data from all the fields from across all the Excel datasets. Hopefully, such records will provide cross-tabulation and statistical analysis from an integrated dataset.

For example, if merging 2 of the Jonah datasets and the Benchmarking dataset :

Def. contribution 1 fields (19,988 Case IDs) :

- Firm
- Case Id
- File Reference
- Start Date
- End Date
- Required Finish Date Days
- Planned Due Date
- Total Delay Days
- Defendant Delay Days
- Value

Def. contribution 2 fields (106,423 Case IDs) :

- Firm
- Case Id
- File Reference
- Acknowledgment Days
- Detailed Liability Days
- Value

Benchmarking data (171,943 records) :

The fields in the Benchmarking dataset offer data about Dates of Incident, Cover going live and Closing the policy. The expectation is that the proportions of the entire timescale and the cost/value could be quantified more relevantly, making use of the matching of relevant categorical variables, such as Track Description, Cover Year, Liability Discount, that exist in other datasets too.

It will probably create a larger number of records in this new dataset than e.g. the 171,000 records in the Benchmarking dataset, and there may be 'missing data' (Null fields) but the relationships of interest in the data are not being fully explored as the Excel datasets are, to use a cliché, 'not talking to each other'. In the merging of 3 datasets, some of the fields will, of course, contain the same data values e.g. Value (£) should be the same in both datasets for the same Case ID, which is what you would expect in an integrated database.

To enable us to assume that the integrated dataset is 'correct' and from a quality control perspective, the merging should be managed by the client. It would be catastrophic if we were to mismatch the merging and present incorrect analysis.

Defendant behaviour

No numerical data was provided on this important aspect of the research so as to be able to make suitable inferences, as a result we confined our analysis to defendant *action*.

The following synopsis of the provided datasets concentrates on the data and the factual, and pinpoints some aspects of the processing of that data into information that can be presented in tables or diagrams with suitable confidence.

Allianz dataset 1

Statistical calculations were permitted using cross-tabulations by categorical fields (e.g. Case Type description, Track description) and numerical calculations on durations (e.g. Ncsh Liab Admitted date, Wonpaid date and Date of Cover). This dataset did not provide defendant delay or delay costs data.

Durations were calculated between the 3 dates and the ratio of duration spent until Liability admitted, but this was only available on one third of the policies. No sense of defendant delay, causes of delay or behaviour emerged in these calculations.

Allianz dataset 2

In the 'Case duration' and 'Opponents Costs' worksheets, statistical calculations were permitted using cross-tabulations by categorical fields (e.g. Case Type Description, Track Type) and numerical calculations on durations were permitted (e.g. Ncsh Liab Admitted date, Wonpaid date and Date of Cover). These datasets did not provide defendant delay or delay costs data.

Durations were calculated between the 3 dates and the ratio of duration spent until Liability admitted.

No sense of defendant delay, causes of delay or behaviour emerged in these calculations.

Allianz dataset 3

We were given 50 records of the November 2006 survey and then another dataset with 64 records (from Stamp Jackson and Procter). In 37 of these latter records there was no Policy Number.

No data on defendant delay, causes of delay or behaviour emerged in these calculations.

A further Excel file was provided with data on 336 won cases ('Jackson returns file'). There was no raw data on the 336 cases on which to compile statistical calculations and the many worksheets appeared to have been previously analysed. No data on defendant delay, causes of delay or behaviour emerged in these worksheets.

Benchmarking data

Statistical calculations concentrated on file 'Backup data for Jon discount rates' which permitted cross-tabulations by categorical fields (e.g. Track Description, Liability Discount, Case Type description, Post 30 April) and numerical calculations on durations (e.g. Policy Closed Date – Cover Live date) and Premium value (£). This dataset did not provide defendant delay or delay costs. None of the other Excel files on the CD seem to help with such calculations.

Durations were calculated around the 3 dates of : Closed date, Date of cover and Incident date. No sense of defendant delay, causes of delay or behaviour emerged in these calculations.

Jonah data

Statistical calculations in the file 'Defendant Contribution-1' were not permitted using cross-tabulations by categorical fields (e.g. Track Description, Liability Discount, Case Type description) but important numerical calculations on durations were possible (e.g. Total delay days, Defendant Delay days) and were directly linked to Value by each Case ID.

Statistical calculations in the file 'Defendant Contribution-2' were not permitted using cross-tabulations by categorical fields (e.g. Track Description, Liability Discount, Case Type description) but important numerical calculations on durations were possible (e.g.

Acknowledgement days, Detailed Liability days) and were directly linked to Value by each Case ID. Analysis was especially possible on durations and value, both inside and outside the 21 day and 90 day protocols.

Statistical calculations in the file 'Defendant Contribution-3' were limited to crude rates of success in cases won and lost. No cross-tabulations by categorical fields or numerical calculations on durations were possible.

Where Null fields were recorded in the data, they were easily categorised and separated away from cases where full data was apparent. This has the obvious implication that we are cautious about representation in the dataset and being able to compile high quality inferences and summary information.

However, despite the Null records there may still be residual data on dates, durations etc..

Lack of a clear field on which we could attempt comparative analysis i.e. the various datasets lack a single indicator from which we could complete an integrated analysis with a consistent framework and definition across the Allianz, Jonah and benchmarking datasets..

The Jonah dataset was the most useful, from which we could clearly identify defendant delay days and calculate the average value of defendant delay days.

Appendix 3 – Defendant Behaviour: Possible Further Research

NAH Ltd has identified a further research question, namely:

Is it possible to conclude that it is within the Defendants' power to significantly reduce both sides' costs by behavioural changes?

Following analysis of the current datasets, we consider that it is beyond the scope of this research to reach such a conclusion as the current data provides information on defendant actions but not defendant behaviour. As a result, any conclusions are limited to looking at the effect of defendant *actions*, where these are recorded, and where the data allows for analysis of the effect that defendant action has on other variables such as costs and/or where defendant action can be considered as one variable in the process.

It would however be possible to do a further piece of qualitative research on defendant behaviour to examine, for example:

1. The reasons for defendant behaviour and, in particular, how decisions to admit or refuse liability are taken.
2. Factors that influence defendant behaviour, the impact that claimant/panel solicitor action has on defendant behaviour and how defendants' respond to certain actions within the protocol.
3. Qualitative data from NAH panel members (and others) on attitudes towards defendant behaviour and its causes.
4. Defendant behaviour in the investigation of claims and attitudes towards the instigation of proceedings.

Methodology

Completion of this research primarily requires the collection of qualitative data to analyse the specific behaviours of both claimant solicitors and defendant insurers within the protocol. We would also need to map all tasks within the protocol with a view to developing a 'protocol matrix' identifying the points at which delay occurs, the nature of the delay and its resultant impact on the progress of a case. In doing so, our analysis would distinguish between defendant delay and other causes of delay to identify the crucial elements of delay impacting negatively on the progress of a case.

We envisage discussions with fee earners and others involved in recording protocol tasks and defendant delay in order to properly evaluate this issue. We would also require access

to relevant data on the extent of data in cases, where this has been recorded. The data would be subject to the same confidentiality as data used within the current project.

We would also need to conduct sufficient interviews to effectively evaluate defendant and claimant behaviours, any variations in these and their respective attitudes towards risk and settlement. It is difficult at this stage to identify the precise number of interviews involved the sample size needs to be sufficient to ensure robust conclusions. It would need to consider different functions within the protocol e.g. NAH panel members, ATE provider or other claimant insurers, defendant insurers and others as required.

Timescale

Access issues (for example the availability of interviewees and access to data) will determine the precise scope and timescales for this research. However, the scope of the research is such that it requires a longer timescale than the current project and we recommend that as a minimum, a month be allowed for the research. A longer period may be necessary if there are issues with access to interviewees.

Outcomes

The research will result in a research report which examines in more detail the issue of defendant delay by considering defendant behaviour within the context of the protocol and linking defendant behaviour to the defendant actions considered in this research. We would, therefore, be able to assess the veracity of the claims made by Thompsons Solicitors²⁸ and others that delay by defendant insurers' is an industry tactic intended to frustrate settlement of claims and, in some cases, discourage claimants from pursuing cases to a resolution. Our recommendations arising from this research could include; measures necessary to address defendant delay, regulate such behaviours or to address them via changes to the civil justice regime.

A more detailed research proposal can be developed as required.

To discuss further contact Dr Angus Nurse at anurse@lincoln.ac.uk

²⁸ Thompsons Solicitors (2009) *Civil Litigation Costs Review: Thompsons Solicitors response to the Interim Report*